SUPREME COURT, U. S.

No. 499

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

GRINNELL CORPORATION, et al.,
Petitioners,

v.

RUSS TOGS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Respondents do not agree that the questions presented are correctly stated in the petition. The questions presented are:

1. Whether a government antitrust injunction action continues to "pend" within the meaning of Section 5(b) of the Clayton Act, so as to toll the statute of limitations on parallel private damage actions, during contested remand proceedings following an appeal to this Court, especially where the record before this Court in the government action was insufficient to determine the legality of certain practices under the antitrust laws.

2. Whether the period of "pendency" under Section 5(b) of the Clayton Act includes the time within which an appeal as of right from the final judgment entered at the conclusion of such remand proceedings might have been taken.

COUNTER-STATEMENT OF THE CASE

Approximately eighty consumer and competitor treble-damage cases have been filed based upon the government's recent successful antitrust suit against petitioners for conspiratorially monopolizing the central station protection service industry in violation of the Sherman Act. *United States* v. *Grinnell Corp., et al.*, 236 F. Supp. 244 (D.R.I.), *aff'd in part and rev'd in part*, 384 U.S. 563, *on remand*, Civ. No. 2785, D.R.I., July 11, 1967 (unreported). Sixty of these eighty were filed more than one year after this Court remanded the *Grinnell* case to the district court but within a period of one year following the district court's judgment on remand or the expiration of the time to appeal therefrom. This petition involves those sixty pending cases.*

On appeal of the government antitrust injunction suit, this Court affirmed the district court's finding that certain acts and practices of petitioners were in violation of the Sherman Act (384 U.S. 563). It was confronted with a "controversy," however, as to whether certain other practices employed by petitioners—in particular, "the requirement that subscribers sign five-year contracts and the retention by ADT of title to the protective services equipment installed on a subscriber's premises"—did "constitute substantial barriers to competition" or have had "coercive power * * * toward restraining competition and creating a monopoly," thus making "relief against them * * * appropriate" (*id.* at 578).**

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* The issue as to whether a case continues to pend during the running of the time to appeal is involved in only four of these sixty cases.

**The 1964 opinion of the district court made no determination with respect to these practices.

This Court held that, despite the "considerable vehemence" with which the *pros* and *cons* of that controversy were argued, "we cannot resolve them on this record" (*ibid.*). The cause was therefore remanded with instructions that "the various aspects of this controversy must be explored by the District Court" (*ibid.*) and that the factual bases of the parties' contentions were "a proper subject for inquiry on remand" (384 U.S. at 578, n.9). The district court was further instructed that "the precise practices found to have violated the [Sherman] Act should be specifically enjoined" in lieu of the previously entered "broad and generalized" injunction in the statutory language (*id.* at 579-80).

On remand, substantial discovery was conducted, including the taking of oral depositions and extensive documentary production. The parties also entered into stipulations on matters such as market shares and identity of competitors. Hearings were then held before the district court at which both documentary and testimonial evidence was adduced. Petitioners specifically recognized that there were "issues or matters in this cause open on remand" and that the precise terms of the final judgment to be entered on remand would have "possible impact upon damage claims" against them.*

On July 11, 1967, the district court rendered a comprehensive "Judgment" based on the record made prior to the appeal, on the agreements reached after remand, and on the additional evidentiary material adduced following remand. In this Judgment, the district court found that

* Statement of American District Telegraph Company with respect to proposed form of judgment, pp. 1-2 (Feb. 6, 1967). To the same effect were Statement of Automatic Fire Alarm Company of Delaware with respect to proposed form of judgment (Feb. 2, 1967), and Memorandum on Remand of Grinnell Corporation, pp. 3-4 (June 9, 1967).

the petitioners had violated §§ 1 and 2 of the Sherman Act and enjoined numerous specific practices found to have been part of petitioners' Sherman Act violations which had not been enjoined prior to the appeal to this Court, and granted other relief. The Judgment also contained the usual retention of jurisdiction provisions.

In their partial summary judgment motion below, petitioners urged that the action brought against them by the government ceased to "pend" for purposes of §5(b) of the Clayton Act on June 13, 1966 when this Court affirmed a finding that the Sherman Act had been violated and remanded for further proceedings.* It was petitioners' contention that the government action continued to pend only until all matters of liability were finally determined although questions of relief remained to be adjudicated.

Both the Court of Appeals and the District Court rejected petitioners' attempt to confine pendency for §5(b) purposes to the "liability" phase of the case and held that the Government suit continued to "pend" until a final judgment on remand was entered and the time to appeal therefrom had expired. Both decisions emphasized the plain and clear meaning of the word "pendency" and the relevant legislative history of §5(b) in reaching their conclusion. Both courts concluded that the decision of this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, and other decisions interpreting Section 5 of the Clayton Act, as amended, required that the petitioners' formulation be rejected in order to provide antitrust plaintiffs with "the full benefits of government proceedings" (App. C, pp. 37-38) and to provide a workable and easily administered rule of law. Both

*It was alternatively urged that the Government suit ceased to "pend" on July 11, 1967, when the final judgment on remand was entered, and not sixty days thereafter when the time to appeal therefrom had expired.

courts below recognized that any support which the petitioners gained from the *dicta* upon which they relied was no longer available in light of the amended statute and *Minnesota Mining*. Finally, the Court of Appeals made it clear that regardless of the validity of the liability-relief formula, petitioners could gain no solace from it in the instant case, since "significant issues remained to be decided by the district court" on remand and "in this sense," this Court's "decision did not finally determine all issues of liability" (App. C, pp. 38-39).

ARGUMENT

The decision below is in accord with all prior holdings dealing with the questions presented; no conflict between circuits exists. In any event, issues of antitrust liability were fully considered and determined during the contested remand proceedings, thus providing no basis for success by petitioners even if there is validity to their liability-relief formula. Moreover, this Court's decisions in *Minnesota Mining* and *Leh* require the decision below.

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THE SEVENTH CIRCUIT.

Contrary to petitioners' suggestion (Pet., pp. 9-10), every court which has considered the question has ruled with the courts below that a government enforcement action continued to "pend" for purposes of Section 5 of the Clayton Act during proceedings on remand from this Court. *Valuskis* v. *Lock's Inc.*, 140 F. Supp. 34 (S.D. Cal. 1956); *Twentieth-Century Fox Film Corp.* v. *Brookside Theatre*

Corp., 194 F. 2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942; *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F. 2d 284 (7th Cir. 1954); *Grengs* v. *Twentieth-Century Fox Film Corp.*, 232 F. 2d 325 (7th Cir.), *cert. denied*, 352 U.S. 871; *Baldwin* v. *Loew's Inc.*, 312 F. 2d 387 (7th Cir. 1963); *Don George, Inc.* v. *Paramount Pictures, Inc.*, 111 F. Supp. 458 (W.D. La. 1951); *Alex Theatre Corp.* v. *Balaban & Katz Corp.*, 1952 CCH Trade Cas. ¶ 67357 (N.D. Ill. 1952); *Barnett* v. *Warner Bros. Pictures Distrib. Corp.*, 112 F. Supp. 5 (N.D. Ill. 1953); *Electric Theatre Co.* v. *Twentieth-Century Fox Film Corp.*, 113 F. Supp. 937 (W.D. Mo. 1953); *Manny* v. *Warner Bros. Pictures, Inc.*, 116 F. Supp. 807 (S.D. Cal. 1953); *Leonia Amusement Corp.* v. *Loew's Inc.*, 117 F. Supp. 747 (S.D.N.Y. 1953); *Hopkinson Theatre, Inc.* v. *RKO Pictures, Inc.*, 1954 CCH Trade Cas. ¶ 67742 (S.D.N.Y. 1954); *Tague* v. *Balaban*, 146 F. Supp. 356 (N.D. Ill. 1956); *Gordon* v. *Loew's Inc.*, 147 F. Supp. 398 (D.N.J. 1956); *Court DeGraw Theatre, Inc.* v. *Loew's Inc.*, 172 F. Supp. 198 (E.D.N.Y. 1959); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (S.D.N.Y. 1961). No case has ever held, as petitioners here contend, that pendency following appellate remand turns on whether the remand proceeding deals with liability or remedy.

In seeking to create the appearance of a conflict between the Second and Seventh Circuits, petitioners rely on the *Baldwin*, *Grengs* and *Tague cases*, *supra* (Pet., pp. 9-10). However, in *Grengs* the court explicitly held that the government enforcement action to which it referred (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131) had continued to "pend" during the remand proceedings following a 1948 decision by this Court. Similarly in *Baldwin* and *Tague* the courts ruled that the government enforcement action in question had continued to pend during the proceedings which followed this Court's 1948 remand and

ceased to pend in 1950 when this Court denied rehearing of its final decision and *did not remand*. *United States* v. *Loew's, Inc.*, 339 U.S. 974, *rehearing denied*, 340 U.S. 857.

Greggs, upon which petitioners place major reliance (Pet., pp. 9-10), did not hold that a case would not continue to pend following a remand as to remedy alone. Having decided that the *Paramount* case remained pending following this Court's 1948 remand it became unnecessary for the Seventh Circuit to decide whether there was a liability-remedy dichotomy. Thus, it said "we do not hold that the remandment, insofar as it dealt with the remedy only, would be significant here," and left open the question which the Second Circuit has now decided. But even if the Seventh Circuit had decided this question, it would have been mere *dictum* and insufficient to create a genuine conflict among the circuits.

At most, the *Baldwin* case stands for the proposition that once a final decree is affirmed by this Court with a denial of a rehearing and without remand, the action ceases to pend, and the limitations period is not reopened by a subsequent decree promulgated under a retention of jurisdiction provision (312 F. 2d at 393). This is far from a holding that an action ceases to pend as soon as all issues of liability have been resolved. The question of continued pendency during proceedings held pursuant to a retention of jurisdiction clause, on which *Baldwin* turned, was not reached by the court below (App. C, p. 37, n. 8) and hence cannot be the basis for a conflict between the circuits.

The third case on which petitioners rely, a district court decision, *Tague*, does contain *dictum* supporting a "right-remedy" distinction. *Tague* presented the identical question as *Baldwin*, and therefore could have been decided without stating a principle which would touch upon the present case. Significantly, the Seventh Circuit did not cite

Tague in deciding *Baldwin*. Instead, it cited and relied on decisions of the Southern District of New York.

Above all, whatever support the "right-remedy" *dictum* in *Tague* provides for petitioners that *dictum* is based upon a premise which has been explicitly rejected by this Court —that the *prima facie* evidence provision of §5(a) is inextricably intertwined with the tolling provision of §5(b).* See *Minnesota Mining*, *supra*, and *Leh v. General Petroleum Co.*, 382 U. S. 54, holding that "the potential advantages available to [private] litigants because of §5(b) reach far beyond the specific and limited benefits accruing to them under §5(a)." *Minnesota Mining*, 381 U. S. at 319-20. Thus, as the court below correctly found, whatever support might have been available to petitioners from the *dictum* relied upon was no longer available in light of the subsequent decisions of this Court. (App. C, pp. 34-37).

As we have shown, therefore, petitioners' assertion that there are "explicit" and "uniform" holdings in a "number of cases in the Seventh Circuit" which are in conflict with the decision below (Pet., pp. 5, 7-14) is without support.

II.

EVEN UNDER THE LIABILITY-RELIEF FORMULA, THE COURT OF APPEALS FOUND THAT MATTERS OF LIABILITY REMAINED OPEN AND WERE DETERMINED DURING THE REMAND PROCEEDINGS.

Petitioners would not prevail even under the "liability-relief" distinction they would here apply. The Court of Appeals made clear that it would have reached the same

* *Tague* involved Section 5 of the Clayton Act prior to its 1955 amendment. Former §5 lumped the *prima facie* evidence and tolling provisions together; the 1955 amendment separated those provisions into two independent subsections.

result even if the erroneous construction of Section 5(b) urged by petitioners was applied. That court examined the decision of this Court in the *Grinnell* case and the subsequent remand proceedings (precisely as petitioners suggest the Seventh Circuit decisions require), and found that the issues left open for decision on remand involved substantial issues relating to antitrust liability.

As noted by the court below:

> "* * * often ultimate liability in government enforcement actions can be defined only in terms of the relief granted. This is quite arguably true in the instant case. The Supreme Court's decision, *United States* v. *Grinnell Corp.*, *supra*., left important matters open for determination on remand. The Court found it impossible to resolve on the record before it the extent to which long term contract and title retention requirements imposed on central station protective service subscribers constituted substantial barriers to competition requiring protective provisions. The district court was directed to explore the various aspects of the issue on remand and to fashion suitable protective provisions to deprive the two devices of whatever coercive power they might be found to have, 384 U.S. at 578. The Court also directed the district court to replace its broad and generalized restraining order with one specifically enjoining the precise practices found to have violated the Act. *Id.* at 579. Thus, significant issues remained to be decided by the district court. In this sense the Supreme Court's decision did not finally determine all issues of liability" (App. C, pp. 38-39).

In short, the remand was not for the purpose of determining whether concededly innocent practices should be enjoined in the remedial discretion of the district court; nor was it solely to fix the details of divestiture. To the contrary, nothing could more plainly have involved questions

of wrongdoing or violation of the antitrust laws. Under these circumstances, certiorari should not be granted. *SS Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, *rehearing denied*, 359 U.S. 999. See also Stern & Gressman, *Supreme Court Practice*, 4th Ed. 1969, pp. 157-158; Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 471 (1953).

III.

THE PETITION RAISES NO QUESTIONS OF FUNDAMENTAL IMPORTANCE IN THE ADMINISTRATION OF THE CLAYTON ACT AND THE PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS WHICH THIS COURT HAS NOT ALREADY DECIDED.

Despite petitioners' bald assertion to the contrary (Pet., pp. 7-8), the instant petition raises no legal or policy questions fundamental to the effective administration of private antitrust enforcement actions which this Court has not already decided.

Thus, in *Minnesota Mining*, *supra*, this Court underscored that "it is plain that in § 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions" (381 U.S. at 317). In this context, this Court noted that §5 (b) permits "a litigant to await the outcome of government proceedings * * *" (*id.* at 319) and that § 5(b) anticipates that "difficult questions of law may be tested and definitively resolved [in the government proceeding] before the private litigant enters the fray" (*ibid.*). This Court also quoted with approval the observation that § 5(b) suspends "the running of the statute of limitations until *the termination* of government proceedings." *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561, 10th Cir., *appeal dismissed*

sub nom. Wade v. *Union Carbide & Carbon Corp.*, 371 U. S. 801 (emphasis supplied).

Following *Minnesota Mining*, in determining the effect to be given to Section 5(b), this Court recognized that:

> "* * * effect must be given to the broad terms of the statute itself * * * read in light of congress' belief that private antitrust litigation is one of the surest weapons for effective law enforcement of the antitrust laws." *Lek* v. *General Petroleum Corp., supra*, 382 U.S. at 59.

In short, this Court has clearly established that Section 5(b) allows a potential private plaintiff to "await the outcome" of the government action before deciding whether and on what basis to bring a treble-damage case based upon the government action. *Minnesota Mining, supra*, 381 U.S. at 319. Until that time, the private plaintiff has only incomplete knowledge as to the need for instituting an antitrust action* as well as of the possible benefits available to him in such a lawsuit. Indeed, this Court has explicitly held in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 484-85 that the benefits to private plaintiffs are not completely fixed and available until the termination of the liability and remedy phases of a government action.

The availability of possible benefits flowing from relief proceedings was recognized by the Court of Appeals below (App. C, pp. 38-39) and is conceded by petitioners (Pet., p. 13). However, petitioners there suggest a procedure—delay of trial—which would merely make such benefits available at trial, rather than before the institution of a

*For example, prior to the termination of the relief aspects of a proceeding a plaintiff whose objective in bringing a lawsuit is injunctive relief could not determine if it were necessary to sue or if all the relief he might seek was secured by the government.

lawsuit. Clearly, the aforementioned authorities establish the right to have these benefits available before bringing suit and not solely at trial. Petitioners' suggestion would require a withdrawal from the clear principles established by those cases.

It is thus clear that petitioners' position is contrary to plain Congressional intent and this Court's rulings. Moreover, as noted by the court below, it is also impractical, since it is fraught with "conceptual difficulties which arise from an attempt to use appellants' distinction between liability and relief" (App. C, p. 39).

Above all, this Court's *Minnesota Mining* and *Leh* decisions explicitly caution against a "grudging interpretation" or "niggardly construction" of the Clayton Act's tolling provision, and make it clear that any doubts should be resolved in favor of private plaintiffs. This is the underlying policy governing private antitrust enforcement. Its meaning is clear. The instant petition raises no new questions calling for further "guidelines" in this connection.*

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* The clarity of this basic policy is further demonstrated in such post-*Minnesota Mining* and *Leh* cases as *Hardy Salt Co.* v. *State of Illinois*, 377 F. 2d 768, 769 (8th Cir.), *cert. denied*, 389 U. S. 912 (§5(b) tolls the statute during the pendency of a government antitrust proceeding and for one year thereafter "as to a party named as a co-conspirator, and not as a defendant in the government litigation"); *State of New Jersey* v. *Morton Salt Co.*, 387 F. 2d 94 (3d Cir.), *cert. denied sub nom. International Salt Co.* v. *New Jersey*, 391 U. S. 967 (§5(b) tolls the statute as to a subsequent treble action based in whole or in part on a prior government proceeding even as to non-defendants in the government action; the statute was tolled until the government proceeding was concluded as to the last defendant, even though a defendant in the government and private proceedings entered an earlier consent decree in the government proceedings and would otherwise have been protected by the statute). As in both *Hardy Salt* and *International Salt*, the instant case does not present the Court with any fundamental questions needing resolution.

In sum, petitioners do not raise questions of fundamental importance to private antitrust enforcement. By contrast, they merely seek a retrenchment in guidelines clearly established by Congress and this Court with which they do not agree. We submit that the court below properly dismissed petitioners' contentions as contrary to established principles and that no questions warranting this Court's review are present.

IV.

PETITIONERS HAVE NOT ESTABLISHED ANY CONVINCING REASON FOR THIS COURT TO ISSUE THE WRIT ON THE QUESTION OF WHETHER THE "PENDENCY" OF A GOVERNMENT ENFORCEMENT ACTION INCLUDES THE TIME TO APPEAL FROM A FINAL JUDGMENT.

Petitioners further urge (Pet., p. 15) that this Court should grant certiorari to consider whether pendency continues until the time to appeal a judgment has expired and the judgment has become final. Petitioners urge that when Congress amended § 5 in 1955, it intended that the uniform rulings of every court which had dealt with the question* should be rejected and that the one year period then added should commence at a date earlier than the date established by those authorities. But petitioners offer no meaningful legislative history to establish this proposition which contravenes the manifest intent of Congress to add one year to the tolling period. The quotation from the

Twentieth-Century Fox Film Corp. v. Brookside Theatre Corp., supra; Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., supra; Hopkinson Theatre, Inc. v. RKO Radio Pictures, Inc., supra; Leonia Amusement Corp. v. Loew's, Inc., supra; Electric Theatre Company v. Twentieth Century Fox Film Corp., supra.

Senate report* on which petitioners rely (Pet., pp. 15-16) refers to a period of one year following the "conclusion" of the government's case, but says nothing as to when the government's case is to be considered concluded.

From the point of view of a non-participant in the government litigation (and that is the role of a private treble damage claimant for whose benefit § 5(b) was enacted) the government suit could not be considered "concluded" until the parties had evidenced that there would be no further proceedings by allowing the appeal time to expire. This was the rationale of the pre-1955 decisions and of the decision of the court below.

In *Burnett* v. *New York Central Railroad*, 380 U.S. 424, 435 (1965), this Court stated:

> "under familiar principles, which have been applied to statutes of limitations, that the limitations provision is tolled until the state court order dismissing the state court action becomes final by the running of the time during which an appeal may be taken * * *."

While *Burnett* arose under the Federal Employers' Liability Act, the Court referred to Section 5(b) of the Clayton Act and *Electric Theatre Co.* v. *Twentieth Century Fox Film Corp.*, *supra*, as support for this "familiar principle."

Petitioners have failed to assert any reason why this Court should grant certiorari to consider "familiar principles" embodied in a well-reasoned and well supported opinion which is in accord with all existing legal precedents on the question.

*S. Rep. No. 619, 84th Cong., 1st Sess. (1955).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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